No. 187

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IN THE

SUPREME COURT OF THE UNITED STATES.

ALBERT W. NEWSOM et al.,
Petitioners,

vs.

E I. duPONT deNEMOURS & COMPANY,
Defendant.

PETITION FOR CERTIORARI

To the United States Court of Appeals
for the Sixth Circuit

and

BRIEF AND ARGUMENT

On Behalf of Petitioners.

LEWIS S. POPE,
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WHITWORTH STOKES,
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PETITION FOR CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

and

BRIEF AND ARGUMENT

On Behalf of Petitioners.

Your petitioners, Albert W. Newsom et al., respectfully show to the Court as follows:

I.

That they filed this suit in the United States District Court for the Middle District of Tennessee seeking to collect compensation under the Fair Labor Standards Act and under a contract entered into between the collective bargaining agent of petitioners and the defendant. That this suit

was dismissed by the United States District Court, without opinion, and this action of the District Court was affirmed by the United States Court of Appeals for the Sixth Circuit on April 14, 1949.[1]

JURISDICTION OF THE SUPREME COURT.

The jurisdiction of this court is invoked under section 1254, sub-sec. 1, of Title 28 of the United States Code, Annotated, same being the Judicial Code of the United States.

The jurisdiction of the United States District Court was invoked under the Fair Labor Standards Act of 1938,[2] and, also, upon the ground of diversity of citizenship.[3]

The opinion of the Court of Appeals for the Sixth Circuit is in conflict with the opinion of the Court of Appeals for the Eighth Circuit in the case of Central Missouri Telephone v. Conwell, 170 F. 2d 641, and in conflict with the decision of the Court of Appeals for the Seventh Circuit in the case of Frank et al. v. Wilson Co., Inc., 172 F. 2d 712, and in conflict with the opinion of the Court of Appeals for the Ninth Circuit in the case of Joshua Hendy Corporation v. Mills, 169 F. 2d 898.

STATEMENT OF FACTS.

The petitioners are, and were, employees of the defendant in its continuous process rayon manufacturing plant located at Old Hickory, Tennessee. All of the petitioners

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1 For Court of Appeals decision of this case, see 173 F. 2d 856.

2 Ch. 676, sec. 1, 52 Stat. 1060, Title 29, ch. 8, sec. 201 et seq., U. S. C. A.

3 Sec. 6, ch. 676, sub-sec. 7, 52 Stat. 1063, June 26, 1940, as amended October 29, 1941, by ch. 461, 55 Stat. 756, Title 29, secs. 206-216b, U. S. C. A., the Fair Labor Standards Act, ch. 2, Revised Statutes 563 etc., the same being Title 280, Sec. 41, sub-sec. 1, U. S. C. A., the plaintiffs being citizens of the State of Tennessee, and the defendant a Delaware corporation, and the matter in controversy exceeding Three Thousand Dollars exclusive of interest and costs.

are hourly rated employees of defendant, and all worked during the time involved in this cause under the terms and provisions of contracts entered into by the collective bargaining agent of the employees and the defendant. This contract had, among other provisions, the following two provisions:

> "Time and one-half or double time will be paid when required by law or Government Regulation."
>
> * * * * * * *
>
> "(a) Time and one-half will be paid to hourly roll employees:
>
> "(1) For hours worked in excess of eight (8) when more than eight (8) hours are worked consecutively except that, when an employee receives overtime premiums under Company rules for work prior to the start of his regularly scheduled work period, overtime premiums for hours worked in excess of eight (8) will be off-set for the overtime premiums payable under such Company rules" (R. p. 31).

All of the petitioners worked in excess of forty hours a week and in excess of eight consecutive hours per day during the period covered by the original complaint, as amended, and they have not been paid for such overtime, in accordance with the provisions of the Fair Labor Standards Act or in accordance with the contract provisions of the collective bargaining agreement (R. pp. 31, 32).

The petitioners being employees in the defendant's continuous process rayon plant, which is a chemical process plant, worked in acid and other chemicals, which necessitated their changing clothes and putting on protective equipment prior to entering upon their work, and removing such equipment and bathing after completing their work in the chemical plant. This work, for which they

have not been compensated, was performed on the defendant's premises and required and controlled by the defendant; and, by the nature of the work, was not for the benefit of the petitioners, but was for the benefit of the defendant (R. pp. 3, 4).

The petitioners filed their original complaint in the District Court, and the defendant filed an answer containing a general denial of the allegations of the complaint, and claiming the benefit of the three-year statute of limitations contained in the Tennessee Code, and affirmatively pleading defense of the deminimis doctrine and the doctrine of retroactivity (R. pp. 20, 23).

After the passage of the Portal-to-Portal Act of 1947 the defendant filed a motion to dismiss, based upon this legislation (R. pp. 24, 26).

Thereafter the petitioners filed an amended complaint alleging that the case was (a) within one of the exceptions of the Portal-to-Portal Act of 1947; and, further, (b) that the Portal-to-Portal Act of 1947 was unconstitutional if it was held to be a bar to their claims, because it sought to take defendant's property without due process of law; and (c) that, independent of the Fair Labor Standards Act, petitioners had a contract right to the sums sued for (R. pp. 29, 32).

The District Court overruled the motion of defendant to dismiss (R. p. 49).

The defendant thereupon filed an answer to the amended complaint and renewed its motion to dismiss upon the same grounds as the original motion. The District Court thereupon sustained the motion to dismiss and dismissed the cause. However, the District Court filed no memorandum and gave no reason for its action (R. p. 51).

Thereafter, and within the time allowed by the rules, the petitioners appealed this case to the Court of Appeals for the Sixth Circuit, and that court responded in a written opinion, heretofore cited, affirming the District Court.

Petitioners are without remedy save for this petition for certiorari, and they, therefore, pray that they be allowed to file the same, and the writ be granted and issued to the Court of Appeals for the Sixth Circuit, to the end that the record be certified to this Court, and that the judgment of the Court of Appeals for the Sixth Circuit be reversed and this cause be remanded to the United States District Court for the Middle District of Tennessee for trial upon the merits.

LEWIS S. POPE,
JOHN INSCHO,
WHITWORTH STOKES,
Attorneys for Petitioners.

State of Tennessee,
County of Davidson.

Whitworth Stokes makes oath that he is one of the attorneys for petitioners, and that he has read the foregoing petition, is familiar with the contents thereof, and that the statements therein contained are true, to the best of his knowledge, information and belief.

Whitworth Stokes.

Subscribed and sworn to before me this 30th day of June, 1949.

Aline J. Swain,
(Seal) Notary Public.

My commission expires Jan. 31, 1950.

ASSIGNMENTS OF ERROR.

Petitioners herewith tender their assignments of error to the action of the Court of Appeals for the Sixth Circuit, and make the same a part of their foregoing petition for certiorari.

Assignment of Error No. 1.

The Court of Appeals committed error in holding that the claims of the petitioners are not within the exception contained in Section 2 of the Portal-to-Portal Act of 1947. The petitioners' claims, based upon the Fair Labor Standards Act, were excluded from the coverage of the Portal-to-Portal Act of 1947, because they are based upon an express provision of a written contract entered into by the collective bargaining agent of the petitioners and the defendant.

Assignment of Error No. 2.

The Court of Appeals for the Sixth Circuit, in construing the Portal-to-Portal Act of 1947 so as to bar the claims of petitioners, placed a construction upon the Portal-to-Portal Act of 1947 that renders this Act unconstitutional under the Fifth Amendment to the Constitution of the United States.

Assignment of Error No. 3.

The Court of Appeals for the Sixth Circuit committed error in holding that the petitioners' claims are not valid contract claims for which this action can be maintained in the United States courts.

ARGUMENT.

OPINION OF LOWER COURT.

The opinion of the Court of Appeals (6th Cir.) in this case is reported in 173 F. 2d 856.

JURISDICTION OF SUPREME COURT.

The jurisdiction of this court is invoked under section 1254, sub-sec. 1, of Title 28 of the United States Code Annotated, same being the Judicial Code of the United States.

The jurisdiction of the United States District Court was invoked under the Fair Labor Standards Act of 1938[1] and also upon the ground of diversity of citizenship.[2]

The opinion of the Court of Appeals for the Sixth Circuit is in conflict with the opinion of the Court of Appeals for the Eighth Circuit in the case of Central Missouri Telephone v. Conwell, 170 F. 2d 641, and in conflict with the decision of the Court of Appeals for the Seventh Circuit in the case of Frank et al. v. Wilson Co., Inc., 172 F. 2d 712, and in conflict with the opinion of the Court of Appeals for the Ninth Circuit in the case of Joshua Hendy Corp. v. Mills, 169 F. 2d 898.

So far as counsel have been able to find, this is the first case submitted to this court under the Fair Labor

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1 Ch. 676, sec. 1, 52 Stat. 1060, Title 29, ch. 8, sec. 201 et seq., U. S. C. A.

2 Sec. 6, ch. 676, sub-sec. 7, 52 Stat. 1063, June 28, 1940, as amended October 29, 1941, by ch. 461, 55 Stat. 756, Title 29, Secs. 206-216b, U. S. C. A., the Fair Labor Standards Act, ch. 2, Rev. Stat. 563, etc., the same being Title 280, sec. 41, sub-sec. 1, U. S. C. A., the plaintiffs being citizens of the State of Tennessee, and the defendant a Delaware corporation, and the matter in controversy exceeding Three Thousand Dollars exclusive of interest and costs.

Standards Act, as amended by the Portal-to-Portal Act of 1947, where the present question is involved. There have been cases submitted where the question of an express provision of a written contract was claimed on behalf of the petitioners. However, the written contract, referred to in those cases, was a third-party contract which the petitioners sought to avail themselves of.[3]

In this case the contract—which contains the written provision excepting the claim from the bar of the Portal-to-Portal Act, under sec. 2 thereof—was entered into between the collective bargaining agent of the petitioners and the defendant employer. The question is thus squarely presented to the court for the first time and calls for a construction of section 2 of the Portal-to-Portal Act, and this question should be resolved by this court. Particularly is this true where the Court of Appeals for the Seventh and Ninth Circuits have decided an almost identical question in a manner contrary to the decision of the Court of Appeals for the Sixth Circuit in the instant case.[4]

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3 Fisch et al. v. General Motors Corp., 169 F. 2d 266; Bateman et al. v. Ford Motor Co., 169 F. 2d 266. The contracts involved in these cases were between the United States and the companies.

4 See the cases of Frank v. Wilson & Co., 172 F. 2d 712 (7th Cir.); Joshua Hendy Corp. v. Mills, 169 F. 2d 898 (9th Cir.)—for holdings contrary to the Sixth Circuit's holding. See, further, the following cases where the Supreme Court has taken jurisdiction to resolve conflicts between Courts of Appeal of different circuits: Board of Trade v. Christie Grain & Stock Co. (1905), 198 U. S. 236, 247, 25 S. Ct. 637, 49 L. Ed. 1031; Alexander Milburn Co. v. Davis-Bournonville Co. (1926), 270 U. S. 390, 399, 46 S. Ct. 324, 70 L. Ed. 657; Gasoline Products Co. v. Champlin Refining Co. (1931), 285 U. S. 494, 51 S. Ct. 513, 75 L. Ed. 1188; Magnum Import Co. v. Coty (1923), 262 U. S. 159, 43 S. Ct. 531, 67 L. Ed. 922.

PRELIMINARY STATEMENT AND SUMMARY.

There are three general questions that were presented to the District Court and the Court of Appeals, and which we wish to present to this court. The holdings of the District Court and the Court of Appeals on these questions, we have assigned as error here. These assignments of error are:

First Assignment of Error:

Are the petitioners' claims within the exception contained in section 2 of the Portal-to-Portal Act of 1947? —The lower courts said "No".

Second Assignment of Error:

If applied as a bar to petitioners' claims under the Fair Labor Standards Act, is the Portal-to-Portal Act of 1947 unconstitutional?—The lower courts said "No".

Third Assignment of Error:

Are petitioners entitled to a recovery in this case upon their contract with the defendant, irrespective of the Fair Labor Standards Act?—The lower courts said "No".

We believe all of these questions should have been answered in the affirmative.

This is not a "walking time case". The overtime compensation claimed by the employees in this case is substantial, according to the complaint and the defendant's time-studies, and includes, in the case of a great many of the employees, as much as thirty-three and one-half minutes per day. While the matter of walking-time upon the defendant's premises is mentioned in the complaint, it is a completely minor part of the time for which the em-

ployees seek compensation. The amount of time spent by the employees in necessary preliminary and postliminary activities was never taken into consideration in fixing the rate of pay in any collective bargaining agreement or any individual agreement of employment.

The petitioners are, and were, employees of the defendant in its continuous process rayon manufacturing plant located at Old Hickory, Tennessee. All of the petitioners are hourly rated employees of defendant, and all worked, during the time involved in this case, under the terms and provisions of contracts entered into by the collective bargaining agent of the employees and the defendant. This contract had, among other provisions, the following two provisions:

> "Time and one-half or double time will be paid when required by law or Government Regulation."
>
> • • • • • • •
>
> "(a) Time and one-half will be paid to hourly roll employees:
>
> "(1) For hours worked in excess of eight (8) when more than eight (8) hours are worked consecutively except that, when an employee receives overtime premiums under Company rules for work prior to the start of his regularly scheduled work period, overtime premiums for hours worked in excess of eight (8) will be off-set for the overtime premiums payable under such Company rules" (R. p. 31).

All of the petitioners worked in excess of forty hours a week and in excess of eight consecutive hours per day during the period covered by the original complaint, as amended, and they have not been paid for such overtime, in accordance with the provisions of the Fair Labor Standards Act or in accordance with the contract provisions of the collective bargaining agreement (R. pp. 31, 32).

The petitioners being employees in the defendant's continuous process rayon plant, which is a chemical process plant, worked in acid and other chemicals, which necessitated their changing clothes and putting on protective equipment prior to entering upon their work, and removing such equipment and bathing after completing their work in the chemical plant. This work, for which they have not been compensated, was performed on the defendant's premises, and required and controlled by the defendant; and, by the nature of the work, was not for the benefit of the petitioners but was for the benefit of the defendant (R. pp. 3, 4).

The petitioners filed their original complaint in the District Court, and the defendant filed an answer containing a general denial of the allegations of the complaint, and claiming the benefit of the three-year statute of limitations contained in the Tennessee Code, and affirmatively pleading defense of the de minimis doctrine and the doctrine of retroactivity (R. pp. 20, 23).

After the passage of the Portal-to-Portal Act of 1947, the defendant filed a motion to dismiss, based upon this legislation (R. pp. 24, 25).

Thereafter the petitioners filed an amended complaint, alleging that the case was (a) within one of the exceptions of the Portal-to-Portal Act of 1947; and further (b) that the Portal-to-Portal Act of 1947 was unconstitutional if it was held to be a bar to their claims because it sought to take defendant's property without due process of law; and (c) that, independent of the Fair Labor Standards Act, petitioners had a contract right to the sums sued for (R. pp. 29, 32).

The District Court overruled the motion of the defendant to dismiss (R. p. 49).

The defendant, thereupon, filed an answer to the amended complaint and renewed its motion to dismiss, upon the same grounds as the original motion. The District Court, thereupon, sustained the motion to dismiss, and dismissed the cause. However, the District Court filed no memorandum and gave no reason for its action (R. p. 51).

Thereafter, and within the time allowed by the rules, the petitioners appealed this case to the Court of Appeals for the Sixth Circuit, and that court responded in a written opinion, heretofore cited, affirming the District Court.

As to the First Assignment of Error:

Petitioners' Claims Are Excepted From the Provisions of the Portal-to-Portal Act of 1947, by Section 2 Thereof.

The first assignment of error involves the claim of liability of the defendant to the petitioners for overtime compensation under the Fair Labor Standards Act. As a necessary part of this question we must take into consideration the Portal-to-Portal Act of 1947 because, clearly, such claims are barred unless they are within the exceptions contained in the Portal-to-Portal Act of 1947, or unless that act is unconstitutional as applied to the claims of those employees.

During the period covered by this suit, there were three written contracts between the defendant and its employees. The first contract was made September 2, 1944, and continued in effect until January 2, 1946. This contract contained the language set out in the margin[1] with reference to the payment of time and one-half or double time when

1 Contract between Old Hickory Rayon Employees Council (collective bargaining agent of petitioners) and defendant, E. I. duPont de Nemours & Company, Sec. VI, "(b) Time and one-half or double time will be paid when required by law or Government Regulation."

required by law or Government Regulation. It also contained an agreement to pay time and one-half for all work in excess of eight hours whenever more than eight hours were worked consecutively.[2] This latter language, of course, would support a cause of action independent of the Fair Labor Standards Act. However, the provision also complies with the exception contained in Section 2 of the Portal-to-Portal Act of 1947.

The second contract between the parties was dated January 2, 1946, and the third contract was dated May 1, 1947. These last two contracts contained the provision for premium time for work in excess of eight consecutive hours but did not contain the proviso about payment of premium time when required by law or Government Regulation.

Petitioners contend that during the sixteen months the contract of September 2, 1944, was in effect, the express provision contained therein that "time and a half or double time would be paid when required by law or Government Regulation," expressly adopted the provisions of the Fair Labor Standards Act. Article 5, Section (c) of the contract mentions the Fair Labor Standards Act by name, and the answer of the defendant states that it was recognized by the parties that the quoted language in the contract probably embraced the Fair Labor Standards Act. When the whole agreement is studied there can be no doubt that the language "probably embraced" the provisions of the Fair Labor Standards Act and that, as

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2 Contract between Old Hickory Rayon Employees Council (collective bargaining agent for petitioners) and defendant, E. I. duPont de Nemours & Company, Article VI, sec. "(a) Time and one-half will be paid to hourly roll employees: 1. For hours worked in excess of eight (8) when more than eight (8) hours are worked consecutively except that, when an employee receives overtime premiums under Company rules for work prior to the start of his regularly scheduled work period, overtime premiums for hours worked in excess of eight (8) will be off-set by the overtime premiums payable under such Company rules."

an actuality, it expressly recognized and accepted the law as defendant's obligations under the Fair Labor Standards Act.

The defendant's attempted explanation of Article 6, Section (b) of the contract, with reference to time and a half being paid when required by law or government regulation, is to the effect that the defendant was apprehensive of an Executive order, and for that reason the provision was placed in the contract. This explanation of the defendant entirely overlooks Article 17 of the contract, which provides:

> "If, during the life of this agreement, there shall be in existence any applicable law or any applicable rule, regulation or order issued by governmental authority, which shall be inconsistent with any provision of this agreement, such provision shall be suspended and of no effect thereunder so long as such a law, rule, regulation or order shall remain in effect."

The foregoing provision was contained in all of the contracts, and obviously was placed there to take care of any Executive Orders which might be issued. This negatives completely the defendant's argument that the overtime allowance clause had as its foundation the apprehension of defendant relative to Executive Orders.

ADOPTION OF THE FAIR LABOR STANDARDS ACT AND WAGE-HOUR REGULATIONS BY THE CONTRACT OF SEPTEMBER 2, 1944.

(a) **Definition of Work:**

The compensation sought by the petitioners here is for overtime spent in preparing tools and equipment for work and preparing themselves for work in the chemicals they

were required to come in contact with. And also for time spent in replacing tools, etc., and bathing and changing clothes at the end of their shift period. The bathing and changing of clothes was made necessary by their contact with the chemicals and was required by the nature of their employment. It was not for the convenience or exclusive benefit of the employees.

We propose to point out to the court that preparing tools, etc., and bathing and changing clothes, when necessitated by the nature of the work, is "**work**" by judicial definition and by interpretive bulletins and regulations of the Wage-Hour Division of the Department of Labor and that this was true and known to the defendant when the contract of September 2, 1944, was signed.

The defendant, by the execution of the contract containing Article 6 (contract of September 2, 1944) with reference to overtime pay when required by law or Government Regulation, expressly adopted the Fair Labor Standards Act, and a subsequent repeal of the Fair Labor Standards Act, or even the invalidity of that Act, could not affect the defendant's liability to comply with the Act.[1] The provision went further than just to adopt the Fair Labor Standards Act; it expressly adopted the Regulations issued by the Wage-Hour Administrator. The Wage-Hour Administrator, in a release on May 29, 1943, which was prior to the execution of the contract above mentioned, had ruled as follows:

> "This will reply to your memorandum . . . in which you inquire whether time spent by the employees of the subject firm in changing clothes before and after their regular shift should be considered as hours worked within the meaning of the Act.

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1 See decisions on this point under heading (b) this section of brief, Post 18.

"You state that the work done is performed under high temperatures, near furnaces, and requires strenuous physical effort causing the employees to perspire profusely. The company does not require the employees to change their clothes, but the employees make it a practice to do so because they regard it as hazardous to their health to leave the plant without doing so. You state further that the controversy in this matter, between the employees and the company, has reached the stage where a strike may result.

"Release R-1739 [Pr. 24,501.03] reaffirms the position of the Division with respect to changing clothes and 'hours worked.' Where an employee is not required to change his clothing on the premises, time so spent would not be considered hours worked.

"On the other hand, time spent in changing clothes by employees who are required—either by their employer, by state or local statute, by the particular nature of the work, or by any other factor—to change to and from working clothes on the premises, should be considered as hours worked.

"Under the circumstances set forth in your memorandum it would seem clear that the conditions under which the work is performed require that employees engaged therein change their clothing before and after their regular work shift. Accordingly, time so spent in changing clothes would be regarded by the Division as hours worked."

CCH—Labor Law Reporter, Vol. 2, "New Matter," p. 35027 [Pr. 33,014] (W. & Hour Release No. R. 1739).

Prior to this Release by the Wage-Hour Administrator, and in 1942, before the first contract between defendant and its employees was made, the Administrator had ruled

that time spent in changing clothes, such as in the present case, was time worked, within the meaning of the Fair Labor Standards Act.

> "Changing Clothes.—Workers required to change clothes on the premises are considered working during that time, but for enforcement purposes a tolerance of not more than five minutes at the end of each day will be allowed. Whether the work clothes worn by the employees are their own, or uniforms owned by the employer has no bearing. However, clothes are changed on the employee's own time when he is free to wear his work clothes home."
>
> W. & H. Release No. R-1739, February 5, 1942.

The Supreme Court of the United States, in the case of Tennessee Coal, Iron & Railroad Co. v. Muscoda Local 64 (1944), 321 U. S. 500, 88 L. Ed. 949, 64 S. Ct. Rep. 698, 152 A. L. R. 1014, and Jewel Ridge Coal Corp. v. Local 6167 etc. (1945), 325 U. S. 161, 89 L. Ed. 1534, 65 S. Ct. 1063, had ruled that such time was compensable, and the Supreme Court had defined what "work" means, in the following language:

> ". . . And in the absence of a contrary legislative expression, we cannot assume that Congress here was referring to work or employment other than as those words are commonly used—as meaning physical or mental exertion (whether burdensome or not) or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."
>
> Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U. S. 590, 64 S. Ct. Rep. 698, at p. 703 of the opinion.

The Sixth Circuit Court of Appeals had held in Walling, Administrator, v. American Needlecrafts, Inc. (1943), 139

F. 2d 60, that preliminary activities were included in the work week. These cases were followed by the case of Anderson v. Mt. Clemens Pottery Co. (1946), 66 S. Ct. 1187, 328 U. S. 680, 90 L. Ed. 151. The opinion in the **Mt. Clemens** case actually decided nothing new with reference to work. It did extend to surface workers the additional time allowance which had been delineated in the **Muscoda Local** and **Jewel Ridge** cases, and which prior to that time had been allowed in the case of Sunshine Mining Co. v. Carver (1941), 41 F. Supp. 60.

Aside from the walking-time consideration, we are concerned primarily with the matter of changing clothes for the benefit of the employer and for the performance of preliminary and postliminary tasks carried on for the benefit of the employer, for which no compensation has been paid. These tasks, and the changing of clothes, have universally been held to be work within the meaning of the Fair Labor Standards Act. Perhaps it could be said that the Portal-to-Portal Act attempts to eliminate compensation for such activities; but even the Portal-to-Portal Act does not attempt to say that such activities are not work.

(b) **Defendant's acceptance of Fair Labor Standards Act.**

We come then to the consideration of the effect of the adoption of the Fair Labor Standards Act in the contract. It seems apparent from what has been said above that the defendant recognized and accepted its obligation under the Fair Labor Standards Act as such had been construed by the Administrator and by the courts. It also seems apparent that work, as used in the Fair Labor Standards Act, clearly embraced the activities which the petitioners in this case have performed and for which they have not been compensated. Therefore, it remains to be seen what

the effect of the adoption of this Act had upon the plaintiffs' rights, when placed alongside the provisions of the Portal-to-Portal Act of 1947.

The Portal-to-Portal Act contains an exception to the general rule there laid down that portal-to-portal claims are invalidated; and one of the exceptions is where there was an express provision in a written contract to pay for such activities. The express provision in the written contract between the collective bargaining agent of the petitioners and the defendant adopted the Fair Labor Standards Act as fully as though it had been set out therein. Any express reference in a contract to another document makes the document referred to an express part of the contract (Williston on Contracts), and see also particularly an opinion by Mr. Justice Holmes in the case of Interstate Consolidated Railway Co. v. Mass (1907), 207 U. S. 79, 84, 52 L. Ed. 111, 114, 28 S. Ct. Rep. 26, 12 Ann. Cas. 555.

In the **Interstate Consolidated Street Railway Company** case, the question presented was whether the railway company could be required to sell tickets for the transportation of pupils to and from public schools at one-half the regular fare charged by it. The railway company was required to sell such tickets at half fare, by the statutes of Massachusetts. On the trial the railway company offered proof that the regular fare was five cents, and that the actual and reasonable cost of transportation of passengers, per mile, was 4 10/100 cents, and that the pupils of the public schools formed a considerable portion of the passengers carried by it, and that another street railway was exempted from the Act and carried nearly half the passengers transported by the street railways, and received nearly half of the revenue received for such transportation in Massachusetts. The enforcement of the suit against it, the railway company contended, had the effect of denying it equal protection of the law and de-

prived it of its property without just compensation, and without due process of law, all in violation of the Constitution of the United States. The street railway company, therefore, contended that the statute, as applied to it, was unconstitutional.

The trial court held against the street railway, and the Supreme Judicial Court of Massachusetts affirmed. The Supreme Court of the United States, likewise, affirmed. The Court pointed out that, at the time the plaintiff in error took its charter from the State of Massachusetts, the half fare statute was in effect, and the charter of the street railway company contained a clause expressly stating that the street railway company was "subject to all the duties, liabilities and restrictions set forth in all general laws now or hereafter in force relating to street railway companies . . ." The Court stated:

> "There is no doubt that, by the law as understood in Massachusetts, at least, the provisions of Rev. Laws, ch. 112 (the half fare law), if they had been inserted in the charter in terms, would have bound the corporation, whether such requirements could be made constitutionally of an already existing corporation or not. The railroad company would have come into being and have consented to come into being subject to the liability, and could not be heard to complain (Citing cases)."
>
> [28 S. Ct. Rep., p. 26.]

The opinion continues:

> "If the charter, instead of writing out the requirements of Rev. Laws 112, sec. 72, referred specifically to another document expressing them, and purported to incorporate it, of course the charter would have the same effect as if it itself contained the words. If the

document was identified, it would not matter what its own nature or effect might be, as the force given to it by reference and incorporation would be derived wholly from the charter. The document, therefore, might as well be an unconstitutional as a constitutional law. See Com. v. Melville, 160 Mass. 307, 308, 35 N. E. 863. But the contents of a document may be incorporated or adopted as well by generic as by specific reference, if only the purport of the adopting statute is clear (Citing cases)."

[28 Sup. Ct. Rep., at pp. 26, 27.]

The contract between the parties in the instant case had the effect of expressly writing into the contract all of the provisions of the Fair Labor Standards Act, as interpreted by the courts of the United States.

Of course, it is fundamental in our law that the statutes and common law in effect at the time and place in which the contract was entered into, form a part of the contract as fully as though set out and expressed therein. This is true whether the contract makes reference to the law, or not. See Farmers, Etc. Bank v. Federal Reserve Bank (1923), 262 U. S. 649, 43 S. Ct. 651, 67 L. Ed. 1157, 30 A. L. R. 635, where the court, speaking through Mr. Justice Brandeis, said:

"Laws affecting either the construction, enforcement or discharge of a contract, which existed at the time and place of making the contract, and where it is to be performed, enter into and form a part of it as fully as if they had been expressly referred to or incorporated in its terms."

In the case of Ettor v. Tacoma (1933), 228 U. S. 148, 33 S. Ct. 428, 57 L. Ed. 773, the state of Washington had required municipalities to compensate property holders for

damages resulting from street grading. While actions were being tried under this statute, the statute was repealed. The trial court gave a retrospective effect to the repealing act, holding that it destroyed the right to compensation which had accrued while the act was in force. The Supreme Court of the United States, in reversing this, said, inter alia:

> "This was to deprive the plaintiffs in error of a right which had vested before the repealing act, a right which was in every sense a property right. Nothing remained to be done to complete the plaintiffs' right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation." (At p. 156 of the opinion.)

Similarly, the Supreme Court of the United States, in Steamship Company v. Joliffe (1864), 69 U. S. 450, 17 L. Ed. 805, held that the repeal of a California statute providing that when a pilot went out and offered his services to a vessel, the vessel would be liable for one-half the pilotage fees, even though it refused to accept the pilot, could not affect the existing rights of the pilot which had accrued prior to the repeal of the statute.

In the case of Coombs v. Getz (1932), 285 U. S. 434, 52 S. Ct. 435, 67 L. Ed. 866, the court held that a change in the statute affecting statutory liability against creditors of the corporation could not affect the obligation of the directors on existing claims.

Although a cause of action under the Fair Labor Standards Act arises by virtue of the statute, it has been uniformly held that it is not purely a statutory cause of

action, but it is a cause of action based on a contract. See Republic Pictures Corporation v. Kappler (1945), 151 F. 2d 543, where the Court said:

> "The action for overtime under the statute is an action based on contract."

See also, to the same effect: Northwestern Yeast Company v. Broutin (1943), 133 Fed. 2d 628.

The provisions of the Fair Labor Standards Act being in effect during the time when petitioners performed the work here sued for, all the rights and obligations of the Fair Labor Standards Act became a part of the contract of employment and were vested rights at the time of the passage of the Portal-to-Portal Act. This is doubly true here, because not only under the general law is the existing law made a part of the contract, but by express reference and adoption in the written contract the Fair Labor Standards Act was made applicable to the employment relationship.

THE COURT OF APPEALS OPINION IN THE INSTANT CASE.

The Court of Appeals for the Sixth Circuit attempted to give effect to the language contained in Article VI, sec. (a), of the collective bargaining agreement, while at the same time denying effect to the language contained in Article VI, sec. (b), of the collective bargaining agreement. This is apparent from the following quotation from that court's opinion:

> "The Portal-to-Portal Act, which became law subsequent to the enactment of the Fair Labor Standards Act, was framed with specific reference to activities such as those involved herein. As has often been repeated, it was passed in order to bar the innumerable

claims that were being filed under the Fair Labor Standards Act in order to take advantage of the decisions in Tennessee Coal, Iron & Railroad Co. v. Muscoda Local 123; Jewell Ridge Coal Corp. v. Local No. 6167; and Anderson v. Mt. Clemens Pottery Co., 328 U. S. 680, 696, 66 S. Ct. 1187, 90 L. Ed. 1515. Appellants in effect ask us to read these interpretations into the contract in suit, although with certain exceptions the Portal-to-Portal Act expressly repealed them. Seese v. Bethlehem Steel Co.. 4 Cir., 168 F. 2d 58, 62. Such a construction would nullify both the purpose and the provisions of the Portal-to-Portal Act. There being no allegation or proof of the existence of an express contract or custom to pay for the activities described in the complaint, they are barred. The District Court had no jurisdiction of them, 29 U. S. C., sec. 252 (d), 29 U. S. C. A., sec. 252 (d), and a cause of action is not stated.

"Appellants contend, however, that the provisions which was written in all bargaining contracts from September 2, 1944, to the present time, that time and a half for overtime should be paid 'for hours worked in excess of eight . . .' constitutes an express written contract within the protection of the exception and independent of the Fair Labor Standards Act. Since certain of these identical provisions were written into the contracts after the adjudication of the Tennessee Coal, Iron & Rd. Co., the Jewell Ridge Coal Corp. and the Anderson cases, supra, it cannot be successfully contended by the appellee that it did not contemplate that non-productive and incidental activities such as those described in the complaint were work within the Fair Labor Standards Act as interpreted by the Supreme Court in those decisions" (173 F. 2d 860).

This holding of the Court of Appeals for the Sixth Circuit is at variance, and in conflict, with the holding of

the Ninth Circuit Court of Appeals, in the **Joshua Hendy** case,[1] which court held at follows:

> "Under the terms of the Fair Labor Standards Act, Mills was entitled to compensation at straight time for the first 40 hours worked and time and one-half for the remaining 11 hours. Appellant contends that it is relieved from any liability to Mills for claims accruing under the Fair Labor Standards Act by reason of the application of sec. 2 of the Portal-to-Portal Act, 29 U. S. C. A., sec. 252. We think Mills' employement comes within the exception contained in subsection (a) (1) of sec. 2 of said Act, and that his activity was compensable by 'an express provision of a written contract in effect at the time of such activity, between such employee, his . . . collective-bargaining representative and his employer: . . .'.
>
> "We set out in the margin a copy of paragraphs 4 and 5 of the Union agreement between California Shipbuilding Corporation, appellant herein, as employer, and the Metal Trades Department of the American Federation of Labor, representing the employees."
>
> Joshua Hendy Corporation v. Mills, 169 F. 2d 898, pp. 899, 900 of the opinion.[2]

The holding of the Court of Appeals for the Sixth Circuit, in the instant case, is at variance with the holding of the Court of Appeals for the Seventh Circuit, in the case of Frank et al. v. Wilson & Co.[3] The Court of Appeals, in the Wilson case, in holding that the Portal-to-

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1 Joshua Hendy Corporation v. Mills, 169 F. 2d 898.

2 The contract provisions cited by the Court of Appeals for the Ninth Circuit are in substantial accord with the provisions of the contract in the instant case. (See marginal note contained in the opinion of the Court.)

3 172 F. 2d 712.

Portal Act of 1947 was not a bar to the action of the plaintiffs in that case for preliminary and postliminary activities, cited the contract in effect between the parties, which contract was substantially the same as the contract in the instant case. The Court used this language in disposing of defendant's defense of the Portal-to-Portal Act of 1947:

> "Defendant next cites the Portal-to-Portal Act of 1947 and legislative history pertaining thereto as an absolute bar to recovery under this action. It raised this defense by its amended answer as well as by timely motions at the trial. Sec. 2 of the Portal-to-Portal Act provides that no employer be subject to any liability under the Fair Labor Standards Act on account of failure to pay overtime compensation on account of any activity unless such activity was compensable by either (1) an express provision of a written or nonwritten contract, or (2) a custom or practice in effect at the time of such activity.
>
> "The employement contract with the union which represented all the plaintiffs, which was in effect during the period here in question, provided. 'Employees who **are required** to work over 8 hours in any one day . . . will be paid one and one-half times their regular rate for all such overtime hours.' (Emphasis added.)"
>
> * * * * * * *
>
> "We conclude that the activities of the plaintiffs were covered by an express provision of a written contract, and that the Portal-to-Portal Act of 1947 is not a bar to maintaining this action."
>
> [pp. 714, 715 of the opinion.]

Thus, briefly summing up, petitioners contend that during the period that the collective bargaining contract con-

tained the express provision that the Fair Labor Standards Act must be observed, the right of action of the petitioners is clear under the contract, and that Act and the Portal-to-Portal Act of 1947 is no bar to the maintenance of this action for overtime compensation for work actually performed for the benefit of the defendant.

As to the Second Assignment of Error:

Constitutionality of the Portal-to-Portal Act.

It is the position of the petitioners that if the Portal-to-Portal Act is held to be a bar to the maintenance of this action, then that Act is unconstitutional. First, because under the guise of destroying the remedy, the Portal-to-Portal Act actually destroys the right, and because the general remedial statute passed by Congress is made to apply at the whim and caprice of the individual at whom it is directed. See the case of Lynch v. United States (1934), 292 U. S. 571, 54 S. Ct. 840, 78 L. Ed. 1441, wherein Justice Brandeis, speaking for the court, says:

> "Contracts between individuals or corporations are impaired within the meaning of the Constitution [Article I, Sec. 10, Clause (1)] whenever the right to enforce them by legal process is taken away or materially lessened."

It is axiomatic that the law prevailing at the time and place where a contract is entered into is a part of every contract entered into at that time and place, whether the terms of the law are expressly stated in the contract or not. A fortiori, the Fair Labor Standards Act is a part of every employment contract coming within its provisions when such contract was entered into prior to the passage of the Portal-to-Portal Act.

According to the decision in the courts below, the Fair Labor Standards Act was incorporated into the contracts here in question by reference, but the interpretations placed on the statute in **Tennessee Coal, Iron & R. R. Co. v. Muscoda Local**, supra; **Jewell Ridge Coal Corp. v. Local No. 6167**, supra; and **Anderson v. Mt. Clemens Pottery Company**, supra, were "repealed" by the Portal-to-Portal Act. This is a strange innovation in the law of contracts, to incorporate the statute into the contract but have its meaning or interpretation repealed.

This theory is unique in the law and finds no precedent anywhere that counsel has been able to locate. This approach to the problem denies equal protection of the law to all citizens, and it has the effect of destroying vested contract rights under the guise of lessening the remedy, i. e., taking away jurisdiction from the courts to enforce such rights.

All employment contracts in the United States, subject to the Fair Labor Standards Act, embodied the provisions of that Act as interpreted by the courts of the United States. This was sought to be changed by the Portal-to-Portal Act. However, this Act could not have affected vested rights not subject to be divested by Congress or any other authority. Congress, of course, had the authority to alter, modify, or abolish the existing remedy for a violation of those rights so long as some remedy was left whereby the employee could enforce his vested rights. When Congress so effectively abolished the remedy as to prohibit the right, then it transcended the Constitution.

The Portal-to-Portal Act, Sec. 1, declares an emergency, and the case of **Home Building and Loan Assn. v. Blaisdell**, 290 U. S. 398, 64 S. Ct. 231 (1934), supporting mortgage moratorium legislation, is relied upon to support the an-

nulment of the Portal-to-Portal suits. The Blaisdell case does not go that far, however. In the **first place**, the mortgage moratorium statute there sustained was for the period of the emergency only, while the Portal-to-Portal Act is a permanent enactment. In the **second place** the mortgage moratorium statute did not destroy the mortgagee's right to collect his debt, or take the mortgaged property in satisfaction thereof. It merely postponed it, the mortgagor in the meantime being required to pay a reasonable rent. The Portal-to-Portal Act is of a permanent operation and it destroys and not merely postpones the Portal-to-Portal suits. The Blaisdell decision does not support it.

In general the fifth amendment provides that private property shall not be "taken" for public use without compensation. This applies even to a taking under the war power. (U. S. v. Russell, 13 Wall [80 U. S.] 1870; Omnia Co. v. U. S., 261 U. S. 502, 43 S. Ct. 437 [1923].) If it is necessary to preserve commerce and the public treasury that these claims be destroyed, the Government, and not the individual claimants, should stand the cost.

In Lynch v. United States, supra, Mr. Justice Brandeis, speaking for the Court, dealing with matters of War Risk Insurance and the jurisdiction of the federal courts to adjudicate such matters, held that if the Government's contention (that Congress had withdrawn the jurisdiction of the federal district courts to pass on such matters) was sustained, and Congress had not provided any other remedy for the enforcement of the contract rights existing in the holders of War Risk Insurance, that thus Congress had sought to abolish the right under the guise of lessening the remedy. The Court said:

> "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property whether the obligor be a pri-

vate individual, municipality, state or the United States."

Mr. Justice Brandeis further in the opinion holds that the contract clause, which is a limitation upon the states, is in pari materia with the Fifth Amendment, which is a similar limitation upon the Federal Government.

The doctrine that previously vested rights cannot be destroyed by subsequent legislative acts is forcefully affirmed by Mr. Justice Swayne, in **Osborn v. Nicholson**, 13 Wall. (80 U. S.) 654, at p. 662 (1871), in the following language:

> "This is a principle of universal jurisprudence. It is necessary to the repose and welfare of all communities. A different rule would shake the social fabric to its foundations and let in a floodtide of intolerable evils. It would be contrary to 'The general principles of law and reason' and to one of the vital ends of government."

The existing actions constituted property within the meaning of the constitutional guaranties, and a legislative body cannot annul or destroy such rights of action . . . and employees' claims for overtime compensation and liquidated damages under the Fair Labor Standards Act obviously constituted property of which the employee may not be deprived without due process of law (Reid v. Solar Corporation [1946], 69 F. Supp. 626, 6 W. & H. Cases 508).

Therefore, if it is affirmed that the Portal-to-Portal Act is in any way a bar to the maintenance of the present action during the period the contract of September 2, 1944, was in effect, then such a holding must, of necessity, deprive the petitioners of their vested rights and thus render the Portal-to-Portal Act of 1947 unconstitutional on that basis.

For another reason the Portal-to-Portal Act is unconstitutional if it is sought to be used as a bar to petitioners' claims in this case. The Portal-to-Portal Act, if applied here, is an invasion of the rights of the judiciary.

Judge Allen, in the court below, said, in reference to the Portal-to-Portal Act:

> "As has often been repeated, it was passed in order to bar the innumerable claims that were being filed under the decisions in **Tennessee Coal, Iron & Rd. Co. v. Muscoda Local 123**; **Jewell Ridge Coal Corp. v. Local No. 6167**; and **Anderson v. Mt. Clemens Pottery Co.** Appellants in effect ask us to read these interpretations into the contract in suit, although with certain exceptions the Portal-to-Portal Act expressly repealed them."

In the case of Sveltik v. Vultee Aircraft Corporation, U. S. D. C., Northern Division of Texas, 7 Wage-Hour Cases 282, District Judge Wilson uses this language:

> "The courts are called upon to construe the Acts of Congress, but Congress has no authority to construe or nullify the acts of the courts. Congress has no such authority under the terms of the Fair Labor Standards Act. If there was a cause of action accumulated in behalf of these men under the terms of the Fair Labor Standards Act, Congress, nor anybody else, could take that away from them. That is my opinion about it."

See, further, the case of Koshkonong v. Burton (1882), 104 U. S. 668, 26 L. Ed. 886, in which case the court said:

> "To declare what the law is, or has been, is a judicial power; to declare what the law shall be, is legislative; and one of the fundamental principles of our Government is, that the legislative power shall be separate from the judicial. Ogden v. Blackledge, 2 Cranch.

> 276. In this country where the legislative power is limited by written constitution, declaratory laws so far as they operate upon vested rights, can have no legal effect in depriving an individual of his rights, or to change the rule of construction as to a pre-existing law."

Mr. Justice Holmes, in Prentis v. Atlantic Coast Line, 211 U. S. 219, at p. 226, 29 S. Ct. 67 (1908), said:

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist . . . Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter . . ."

The Portal-to-Portal Act attempts to achieve its ends by denying jurisdiction to the courts of suits for minimum wages and overtime compensation unless the claims are based upon matters contained in the exception in the Act. While it is true that the Constitution gives to Congress the power to regulate the jurisdiction of federal courts, such Constitutional power cannot sustain the present enactment. In the first place, the Portal-to-Portal Act is not a jurisdictional matter but a direction to the courts to decide suits for minimum wages and overtime compensation by specified criteria. This distinction is pointed up in the case of U. S. v. Klein (1871), 13 Wall. (80 U. S.) 128, 28 L. Ed. 519 (4 C. C. R. 559).

Klein had brought suit in the Court of Claims against the United States for property taken by the Union Armies. The Court of Claims had jurisdiction of such suits where it was shown that claimants had not aided the rebellion. Klein had given aid, but had subsequently been pardoned by the President. The Court of Claims, relying on the

pardon power to wipe out claimant's previous disability, entered judgment in his favor and the Government appealed. While the case was pending on appeal Congress enacted a statute to the effect that the pardon could not authorize a recovery, and provided further that the Supreme Court should have no jurisdiction of the appeal unless it was shown that the claimant had never aided the enemy. The Supreme Court took jurisdiction and affirmed the court below and stated as its reasons therefor:

"Undoubtedly, the legislature has complete control over the organization and existence of that court and may confer or withhold the right of appeal from its decisions. And if this act did nothing more, it would be our duty to give it effect. If it simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make 'such exceptions from the appellate jurisdiction' as should seem to it expedient.

"But the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have.

• • • • • • •

"The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.

"It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.

"The court is required to ascertain the existence of certain facts and thereupon to declare that its juris-

diction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way?"

The above quotation is particularly apt as applied to the Portal to Portal Act, for in the Portal to Portal Act Congress has, under the guise of passing a jurisdictional act, attempted to tell the federal courts how they shall decide pending litigation. This is an invasion and usurpation of the rights and authority of such courts and finds no support in the Constitution.

As to the Third Assignment of Error:

The Contract Rights of Petitioners Without Regard to the Fair Labor Standards Act.

The contracts of employment between the authorized collective bargaining agent of the petitioners and defendant provided that "Time and one-half or double time will be paid when required by law or Government Regulation"; and in another paragraph of the contracts it was provided: "(a) Time and one-half will be paid to hourly roll employees. (1) For hours worked in excess of eight when more than eight hours are worked consecutively except that, when an employee receives overtime premiums under Company rules for work prior to the start of its regularly scheduled work period, overtime premiums for hours in excess of eight will be off-set by the overtime premiums payable under such Company rules."

The petitioners were hourly roll employees and worked in excess of eight hours; they also worked "prior to the start of his [their] regularly scheduled work period" as the contract specifically provides, but the defendant did not off-set or allow compensation for work prior to the start of the regularly scheduled work period. These pro-

visions of the contracts support a cause of action independent of the Fair Labor Standards Act. The Fair Labor Standards Act provides for overtime compensation for work in excess of 40 hours per week. There is no daily maximum prescribed in the Fair Labor Standards Act.

This phase of the litigation must be decided in favor of the petitioners regardless of this court's action upon the other two questions. Of course, if recovery is based upon this contract theory there can be no liquidated damages and no provision for attorney's fees because this claim can be and should be sustained wholly independent of the Fair Labor Standards Act and within the exception of the Portal-to-Portal Act.

The Court of Appeals, in reference to this question, said:

> "Since certain of these identical provisions were written into the contracts after the adjudication of the Tennessee Coal, Iron & Rd. Co., the Jewell Ridge Coal Corp., and the Anderson cases, supra, it cannot be successfully contended by the appellee that it did not contemplate that non-productive and incidental activities such as those described in the complaint were work within the Fair Labor Standards Act, as interpreted by the Supreme Court in those decisions. However, since the individual contracts of the 334 appellants are independent of statute, the relief sought is not common to all. Rule 23 (a) (3) Federal Rules Civil Procedure. Each appellant has a separate and distinct cause of action, and was required to allege that as to him the matter in controversy exceeds the jurisdictional amount of $3,000.00. **Pinel v. Pinel,** 240 U. S. 594, 596; **Fisch v. Gen. Motors Corp.,** 169 Fed. (2d) 266, 274 (C. A. 6). Since such allegations are lacking, the District Court did not err in dismissing the complaint."

The Court of Appeals, in the first part of its decision, said that the terms of the Fair Labor Standards Act were incorporated by reference to "overtime payments as required by law." However, the opinion then goes on to say that, "in order that activities be expressly compensable under this provision they must be specifically described."

> "Such activities, at that time and always, prior to the decision in Tennessee Coal, Iron & Rd. Co. v. Muscoda Local, supra; Jewell Ridge Coal Corp. v. Local No. 6167, supra, and Anderson v. Mt. Clemens Pottery Co., supra, had been considered as incidental to and included in the productive work and compensated for by the rate of pay on the particular job. The first requisite, then, for the existence of a contract between the parties to pay for these particular activities, namely, a meeting of the minds, was completely lacking."

In other words, the Court has said that the Fair Labor Standards Act, as interpreted, was incorporated into all the contracts sued on. Then the court says that the activities in question must be specifically described in the contract, otherwise there was no meeting of minds of the parties to the contract; and then it says that "It cannot be successfully contended by the appellee that it did not contemplate that non-productive and incidental activities such as those described in the complaint were work within the Fair Labor Standards Act."

The Court of Appeals' answer to the first question to be decided by the court was irreconcilable and inconsistent with the answer to the third question.

Clearly the District Court and the Court of Appeals were in error in holding, without hearing proof, that the petitioners have no claim under the contract with the defendant, for the complaint, as amended, alleged that the peti-

tioners worked in excess of eight hours per day, and that according to the records and time studies of the defendant, these employees worked considerably over eight hours per day. It was, therefore, clearly the duty of the court below to hear proof on this subject and to ascertain the amounts to which each of the petitioners was entitled under this provision of the contract.

The Court of Appeals further held that the contract between the recognized collective bargaining agent of petitioners and the defendant constituted 334 independent contracts in which the relief sought was not common to all, citing Rule 23 (a) (3), Federal Rules of Civil Procedure. Therefore, the court held that each employee had a separate and distinct cause of action, and was required to allege that as to him the matter in controversy exceeded the jurisdictional amount of $3,000.00.

Rule 23 (a) (3) of the Federal Rules of Civil Procedure provides: "If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all, may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

Permissive joinder of parties in class actions based on a common question of law or fact is a modern development in the law. At the common law, collective bargaining agents, unions, associations of great size, etc., were relatively unknown and there was no need for "spurious" class actions as there is today. Therefore, old cases which have denied the propriety of this type of class action can now be regarded as historical material on the problem of

joinder, but no longer authority against "spurious" class actions.

Rule 23 (a) (3) was developed and made a part of our laws for the purpose of preventing a multiplicity of litigation, but the courts below have held that the common question of law here involved must be settled in 334 separate lawsuits. The statutory and judicial recognition of the right to settle this type of question in one common suit is a logical and necessary step in the development of our law.

The contract here involved was negotiated—not by the individual members of the union, but through the union's officers and collective bargaining representatives, and was binding upon the employees and the company. A majority of the members could not oust the union as a representative for a year after its certification, nor during the term of the contract. [Section 9 (c) (3) Taft-Hartley, 29 U. S. C. A., 141.] This labor organization, like all unions, was an organized group of employees which could make contracts as an entity distinct from its individual members.

This was in reality a contract between two entities—on one hand the defendant, E. I. duPont deNemours & Company, and on the other the authorized collective bargaining agent of the union. Neither the stockholders of the defendant company nor the individual members of the union had a hand in the negotiation of the contract here in question.

The petitioners contend that they have a valid contract right which exceeded the value of $3,000.00 plus interest and cost, in addition to and independent of the Fair Labor Standards Act, and that sufficient grounds appeared to unite this claim into one cause of action in order to promote the convenient and speedy administration of justice.

CONCLUSION.

It is, therefore, petitioners' insistence that the petition for certiorari should be granted and that appropriate order be entered in this court reversing the holding of the Court of Appeals for the Sixth Circuit and affirming the holdings of the Court of Appeals for the Seventh and Ninth Circuits, and this cause remanded to the District Court for trial upon the merits.

Respectfully submitted,

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

No. 187

ALBERT W. NEWSOM et al.,
Petitioners,

vs.

E. I. duPONT de NEMOURS & COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

No. .....

ALBERT W. NEWSOM et al.,
Petitioners,

vs.

E. I. duPONT de NEMOURS & COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

Pursuant to the Rules of the Supreme Court of the United States (Rule 38) respondent herewith submits its brief in opposition to petition for certiorari as prayed for by petitioners.

A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor (Rule 38, par. 5).

The sole reason stated in the petition for granting the writ in this case is that appearing on page 2, as follows:

> "The opinion of the Court of Appeals for the Sixth Circuit is in conflict with the opinion of the Court of Appeals for the Eighth Circuit in the case of Central Missouri Telephone v. Conwell, 170 F. 2d 641, and in conflict with the decision of the Court of Appeals for the Seventh Circuit in the case of Frank et al. v. Wilson Co., Inc., 172 F. 2d 712, and in conflict with the opinion of the Court of Appeals for the Ninth Circuit in the case of Joshua Hendy Corporation v. Mills, 169 F. 2d 898."

Respondent contends that the opinion of the Court of Appeals for the Sixth Circuit is not in conflict with any opinion of any Court of Appeals as will be pointed out hereinbelow.

Respondent therefore contends that the reason specified in the petition does not exist, and further that no special and important reasons are shown on the record for granting the writ of certiorari in this case.

COUNTER-STATEMENT OF FACTS.

The petition, at page 3, contains the statement:

> "All of the petitioners are hourly rated employees of defendant, and all worked during the time involved in this case under the terms and provisions of contracts entered into by the collective bargaining agent of the employees and the defendant. This contract had, among other provisions, the following two provisions:"
>
> (Here follows quotations from the contracts.)

This statement is inaccurate as a statement of fact.

On page 12 of the Argument it is conceded that there were three written contracts between the defendant and its employees. The first contract was made September 2, 1944, and continued in effect until January 2, 1946.

The second contract between the parties was dated January 2, 1946, and the third contract was dated May 1, 1947.

The complaint was filed in the United States District Court September 16, 1946, and was a class action seeking the relief authorized in the Fair Labor Standards Act (R. pp. 2-6).

Thus, during the time involved in the cause, there were only two collective bargaining contracts in existence, and only the first contained the provision first quoted on page 3 of the petition, as follows:

> "Time and one-half or double time will be paid when required by law or Government Regulation."

On pages 3 and 4 of the petition there are statements purporting to be statements of fact which are actually only allegations of the complaint, which were denied by this respondent in its answers to the original complaint and the amended complaint (R. pp. 20-23, 35-43).

This is stated in order to avoid any admission on the part of this respondent that the statements in the petition, made as statements of fact, are true, although, as stated by the Court of Appeals in its opinion, since the case was decided on motion to dismiss, the Court will assume the existence of the facts well pleaded in the complaint (R. p. 63).

REPLY TO ASSIGNMENTS OF ERROR AND ARGUMENT.

I.

Petitioners' Assignment of Error No. 1 is as follows:

> "The Court of Appeals committed error in holding that the claims of the petitioners are not within the exception contained in Section 2 of the Portal-to-Portal Act of 1947. The petitioners' claims, based upon the Fair Labor Standards Act, were excluded from the coverage of the Portal-to-Portal Act of 1947, because they are based upon an express provision of a written contract entered into by the collective bargaining agent of the petitioners and the defendant."
>
> (Pet. p. 6.)

This presents the question:

> "Are the petitioners' claims within the exception contained in section 2 of the Portal-to-Portal Act of 1947?"
>
> (Pet. p. 9.)

The District Court and the Court of Appeals answered "No" to this question, the opinion of the Court of Appeals (Sixth Circuit) being reported in 173 F. 2d 856, and appearing on pages 60-66 of the Record.

Respondent contends that in this opinion the Court of Appeals gave careful consideration to the contention made by this assignment of error that petitioners' claims are within the exception contained in Section 2 of the Portal-to-Portal Act of 1947.

The Court held that the provision of the contract of September 2, 1944, that time and a half or double time should

be paid when required by law or government regulation, did not meet the requirements of the exception of the Portal-to-Portal Act contained in Section 2 (a) (1) and (2) because such provision did not refer to and specify the activities for which compensation was to be made.

The Court further held that Section 7 of the Fair Labor Standards Act makes no reference to pay for activities such as are here involved, and while the provisions of the Fair Labor Standards Act became a part of the express contract under the bargaining agreement of September 2, 1944, this incorporation of the statute by references does not add an express provision covering the particular activities, and therefore the exception of the Portal-to-Portal Act does not apply.

The opinion contains the following language:

> "There being no allegation or proof of the existence of an express contract or custom to pay for the activities described in the complaint, they are barred."
>
> (R. p. 65.)

Respondent contends that the opinion of the Court of Appeals is not in conflict with any of the opinions of Courts of Appeals mentioned on page 2 of the petition.

Opinions of Courts of Appeal Claimed to be in Conflict With Opinion in Instant Case.

(1) The first opinion mentioned as conflicting is in the case of Central Missouri Telephone Co. v. Conwell (C. A. 8), 170 F. 2d 641.

In this case the facts were that telephone operators, working the night shift, were permitted to sleep in between calls, and although they were on the job during all of an

eleven hour shift, they were paid for only eight hours work.

The Court held that it was not necessary to the recovery of compensation for time actually devoted to normal work for which the employees were employed, to plead an express written contract or unwritten contract, or practice or custom. The Court stated:

> "We conclude that plaintiffs were on duty, performing compensable activities, during the entire eleven hours they spent at defendant's exchanges during the period involved in this action (citing cases)."

(2) The second opinion mentioned as being in conflict with the opinion in the instant case is Frank et al v. Wilson Co., Inc. (C. A. 7), 172 F. 2d 712.

In this case the Court of Appeals found that the employees were required to commence their usual activities five minutes before the time the employer computed the start of their working day for payroll purposes.

Thus, the activities held in this case to be compensable were the same activities for which the employees were engaged.

Also, it should be noted that the Court of Appeals held the five-minute period to be within the de minimus rule and remanded the cause to the District Court with directions to dismiss the complaint.

(3) The third case mentioned as being in conflict with the opinion in the instant case is that of Joshua Hendy Corporation v. Mills (C. A. 9), 169 F. 2d 898.

In its opinion in this case the Court of Appeals found the facts to be that plaintiff worked an eight and one-half hour day which included a thirty minute lunch period.

He was paid for eight hours only, and the Court held that this employee was engaged in his regular work during his lunch hour, and, therefore, was entitled to recover for overtime.

It is clear that in all three of the opinions mentioned as being in conflict with the opinion of the Court of Appeals in the instant case, the facts found by the Courts supported the judicial conclusion that the employees were engaged in the activities for which they had been employed during time not paid for by the employer.

Such cases are clearly distinguishable from the instant case.

Here, the Court finds that the activities for which compensation is sought are preliminary and postliminary to productive work for which the petitioners were employed (R. p. 60).

Petitioners' Claims Are Not Excepted From the Provisions of the Portal-to-Portal Act of 1947 by Section 2 Thereof.

Section 2 of the Portal-to-Portal Act of 1947 [29 U. S. C., Sec. 252 (a) (1) and (2)], is as follows:

> "**Sec. 2. Relief from Certain Existing Claims under the Fair Labor Standards Act of 1938, as Amended, the Walsh-Healey Act, and the Bacon-Davis Act.—**
>
> "(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of

any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either

"(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

"(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer."

The decision of the Court of Appeals embodied two important holdings, namely: (a) that the exception of the Portal-to-Portal Act contained in Section 2 (a) (1) and (2) thereof, requires a contract which refers to and specifies the activities for which compensation is claimed; and (b) that the incorporation of the Fair Labor Standards Act into a contract by reference, does not meet the requirements of the exception in the absence of a provision expressly referring to and specifying the activities for which compensation is claimed.

With reference to (a) the opinion contains the following language:

"The exception of the Portal-to-Portal Act [29 U. S. C., Sec. 252 (a) (1) and (2)] does not apply to any and all activities engaged in by employees, but only to such as are expressly compensable under a written or nonwritten contract or custom or practice in effect covering the activity. In order that activities be expressly compensable under this provision they must be specifically described. A contract which does

not refer to and specify the activities for which compensation is to be made does not bring the exception into force. It is undisputed on this record that the parties, in executing the contract of September 2, 1944, did not contemplate that the activities described in the complaint should be paid for. Such activities, at that time and always, prior to the decision in Tennessee Coal, Iron & Rd. Co. v. Muscoda Local No. 123, 321 U. S. 590; Jewell Ridge Coal Corp. v. Local No. 6167, 325 U. S. 161, and Anderson v. Mt. Clemens Pottery Co., 328 U. S. 680, 696, had been considered as incidental to and included in the productive work and compensated for by the rate of pay on the particular job. The first requisite, then, for the existence of a contract between the parties to pay for these particular activities, namely, a meeting of the minds, was completely lacking. The transactions in controversy fall squarely within the situation described in the findings and declaration of policy of the Congress made in Section 1 (a) (5) of the Portal-to-Portal Act [29 U. S. C., Sec. 251 (a) (5)], namely, that if this recovery is allowed, it will give payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in."

With reference to (b) the opinion contains the following language:

"The Fair Labor Standards Act, although incorporated by reference into the contract, does not fill this gap, for it contains no provision with reference to the activities for which recovery is here sought. It embodies provisions regulating minimum wages and maximum hours of work in industry generally. The Act does not define work or workweek, nor say any-

things as to whether or not preliminary or incidental activities shall be compensable. Section 7, which fixes the maximum hours of a workweek and forbids employment for any time in excess thereof unless time and a half is paid for overtime (29 U. S. C., Sec. 207), makes no reference to pay for activities such as are here involved. While the provisions of the Fair Labor Standards Act became part of the express contract under the bargaining agreement of September 2, 1944, this incorporation of the statute by reference does not add an express provision covering the particular activities, and therefore the exception of the Portal-to-Portal Act does not apply."

Opinion in Instant Case Consistent With Other Opinions.

In its holding that the exception of the Portal-to-Portal Act requires a contract which refers to and specifies the activities for which compensation is claimed, the opinion of the Court of Appeals in the instant case is consistent with the following:

Lasater v. Hercules Powder Co. (C. A. 6), 171 F. 2d 263, wherein the Court uses the following language:

"The proof disclosed no express contract, written or nonwritten, and no custom or practice for payment of compensation for overtime which would bring appellants' claim within the exception set forth in the Portal-to-Portal Act. Since the activities of the employees had not been previously compensable by virtue of contract, custom or practice, Section 2 of the Portal-to-Portal Act precludes all liability of the employer for payment of such overtime compensation."

Sadler v. Dickey Clay Mfg. Co., D. C. West. Mo., 78 F. Supp. 616, wherein the opinion of the Court contains the following language:

> "We believe that under Section 2 (d), supra, of the Portal-to-Portal Act of 1947, plaintiffs, relying upon a contract, must allege the express provision of such contract that would authorize the payment of compensation for the particular activity claimed; . . ."

Local 626, U. A. W. v. General Motors Corp., D. C. Conn., 76 Fed. Supp. 593, wherein the opinion of the Court contains the following language:

> "But this position completely disregards the fact that there is nothing in those complaints to show that either party to the several contracts of employment—and still less, that both parties to each such contract—ever contemplated that the activities in question should be compensable; they do not show that in the consummation of the contract words were used or other manifestations of intention were given which the plaintiffs in fact understood to mean, or reasonably ought to have understood to mean that compensation would be made for the activities now in question."

Colvard v. Southern Wood Preserving Company, D. C. East. Dist. Tenn., 74 F. Supp. 804, wherein the opinion of the Court contains this language:

> "My judgment is that the contract for the payment of overtime, as intended by the Congress in the Portal-to-Portal Act of 1947, must be an express or written contract concerning the particular time for which overtime compensation is sought."

The foregoing are the only decisions on the point which have come to our attention, although there have been nu-

merous unreported decisions to the same effect, among such being:

Millet v. Bethlehem-Hingham Shipyard, U. S. D. C., Mass. (1948);

Mitchell v. Boston Sausage Co., U. S. D. C., Mass. (1948);

Battery Workers' Union v. Electric Storage Battery Co., U. S. D. C., East. Dist., Pa. (1948);

Hays v. Hercules Powder Co., U. S. D. C., West Dist., Mo. (1947).

In addition, we call attention to the Interpretative Bulletin issued by the Wage and Hour Administrator on November 18, 1947, Sec. 790.9 (c), which contains the following language:

"(c) The phrase 'compensable by an express provision of a written or nonwritten contract' in section 4 (b) of the Portal Act offers no difficulty where a written contract states that compensation shall be paid for the specific activities in question, naming them in explicit terms or identifying them through any appropriate language. Such a provision clearly falls within the statutory description. The existence or nonexistence of an express provision making an activity compensable is more difficult to determine in the case of a non-written contract since there may well be conflicting recollections as to the exact terms of the agreement. The words 'compensable by an express provision' indicate that both the intent of the parties to contract with respect to the activity in question and their intent to provide compensation for the employee's performance of the activity must satisfac-

torily appear from the express terms of the agreement."

Published in Federal Register on November 18, 1947, 29 CFR, 1947 Supp. 790;
Labor Relations Reporter, WHM 7:151.

In its holding that the incorporation of the Fair Labor Standards Act into a contract by reference, does not meet the requirements of the exception in the absence of a provision expressly referring to and specifying the activities for which compensation is claimed, the opinion of the Court of Appeals in the instant case is consistent with the following:

Seese v. Bethlehem Steel Company (C. A. 4), 168 F. 2d 58, wherein the opinion of the Court contains the following language:

"It is argued that the provisions of the statute must be read into the contract of employment and that the right to recover compensation in accordance with its terms accrues upon the rendering of services. As stated above, however, the true situation with respect to claims affected by the Portal to Portal Act is that that act validates the real contract between the parties and merely takes away a statutory remedy given by the prior act. Even if the provisions of the Fair Labor Standards Act be read into contracts of employment, so also must be read the constitutional power of Congress to change that act. As said in Home Building & Loan Ass'n v. Blaisdell, 290 U. S. 398, 435:

"'Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes

of sovereign power is also read into contracts as postulate of the legal order.' "

Local 626, U. A. W., v. General Motors Corp., D. C. Conn., 76 F. Supp. 593, wherein the opinion of the Court contains the following language:

"Thus in effect plaintiffs contend that the provisions of the Fair Labor Standards Act as construed by the Supreme Court of the United States became an inherent part of the contract of employment between the parties which upon performance by the plaintiffs became fully vested and hence beyond the reach of legislative modification. This in my view is the only point in the brief deserving of discussion.

"But this position completely disregards the fact that there is nothing in those complaints to show that either party to the several contracts of employment—and still less, that both parties to each such contract—ever contemplated that the activities in question should be compensable; they do not show that in the consummation of the contract words were used or other manifestations of intention were given which the plaintiffs in fact understood to mean, or reasonably ought to have understood to mean, that compensation would be made for the activities now in question."

Lasater v. Hercules Powder Co. (C. A. 6), 171 F. 2d 263, wherein the opinion of the Court contains the following language:

"With regard to the contention of appellants that the Fair Labor Standards Act should be read into the contract of employment, it was said in Seese v. Bethlehem Steel Co., 168 F. 2d 58, where a similar argument was made, that 'the true situation with re-

spect to claims affected by the Portal-to-Portal Act is that that act validates the real contract between the parties and merely takes away a statutory remedy given by the prior act. Even if the provisions of the Fair Labor Standards Act be read into contracts of employment, so also must be read the constitutional power of Congress to change that act.' "

II.

Petitioners' Assignment of Error No. 2 is as follows:

"The Court of Appeals for the Sixth Circuit, in construing the Portal-to-Portal Act of 1947 so as to bar the claims of petitioners, placed a construction upon the Portal-to-Portal Act of 1947 that renders this Act unconstitutional under the Fifth Amendment to the Constitution of the United States."

(Pet. p. 6.)

This presents the question:

"If applied as a bar to petitioners' claims under the Fair Labor Standards Act, is the Portal-to-Portal Act of 1947 unconstitutional?"

(Pet. p. 9.)

The District Court and the Court of Appeals answered "No" to this question.

The opinion of the Court of Appeals contains the following language:

"The constitutionality of the Portal-to-Portal Act has also been considered recently by this court in Rogers Cartage Co. v. Reynolds, 166 Fed. (2d) 317. While different sections of the Act, namely, Sec. 9 and Sec. 11, were there construed the constitutionality of

the Act was attacked upon grounds similar to those relied on herein. An exhaustive consideration of the validity of the Act was given by this court in Fisch v. General Motors Corp., supra, and its constitutionality was sustained. Cf. Seese v. Bethlehem Steel Co., supra. We adhere to our previous decisions, and deem it unnecessary further to discuss this portion of appellants' argument."

(R. p. 66.)

In the case of Fisch v. General Motors Corp., cited by the Court of Appeals, certiorari was denied by the Supreme Court, 335 U. S. 902, 93 L. Ed. ..., 69 S. Ct. 405.

In addition to the cases cited by the Court of Appeals, the opinions in the following cases have upheld the constitutionality of the Portal-to-Portal Act of 1947:

Battaglia v. General Motors Corp. (C. A. 2), 169 F. 2d 254, certiorari denied 335 U. S. 887, 93 L. Ed. ..., 69 S. Ct. 236;

Darr v. Mutual Life Ins. Co. of New York (C. A. 2), 169 F. 2d 262, certiorari denied 335 U. S. 871, 93 L. Ed. ..., 69 S. Ct. 166;

Atallah v. B. H. Hubbert & Son, Inc. (C. A. 4), 168 F. 2d 993, certiorari denied under style of Cingrigrani v. B. H. Hubbert & Son, Inc., 335 U. S. 868, 93 L. Ed. ..., 69 S. Ct. 138;

Rogers Cartage Co. v. Reynolds (C. A. 6), 166 F. 2d 317;

Potter v. Kaiser Co. and Role v. Neils Lumber Co. (C. A. 9), 171 F. 2d 705.

In view of the uniform holding by all the Courts that the Portal-to-Portal Act of 1947 is constitutional, and in view of the further fact that this Court has denied certiorari in

several such cases, we deem it unnecessary further to discuss petitioners' Assignment of Error No. 2.

III.

Petitioners' Assignment of Error No. 3 is as follows:

> "The Court of Appeals for the Sixth Circuit committed error in holding that the petitioners' claims are not valid contract claims for which this action can be maintained in the United States courts."
>
> (Pet. p. 6.)

This presents the question:

> "Are petitioners entitled to a recovery in this case upon their contract with the defendant, irrespective of the Fair Labor Standards Act?"
>
> (Pet. p. 9.)

The District Court and the Court of Appeals answered "No" to this question.

The opinion of the Court of Appeals on this point is as follows:

> ". . . since the individual contracts of the 334 appellants are independent of statute, the relief sought is not common to all. Rule 23 (a) (3), Federal Rules of Civil Procedure. Each appellant has a separate and distinct cause of action, and was required to allege that as to him the matter in controversy exceeds the jurisdictional amount of $3,000. Pinel v. Pinel, 240 U. S. 594, 596; Fisch v. General Motors Corp., 169 Fed. (2d) 266, 274 (C. A. 6). Since such allegations are lacking, the District Court did not err in dismissing the complaint."
>
> (R. p. 66.)

Petitioners contend that Rule 23 (a) (3) of the Federal Rules of Civil Procedure permits a joinder of parties in class actions based on a common question of law or fact.

(Pet. p. 37.)

Respondent contends that Rule 23 (a) (3) does not authorize the joinder of individual causes of action so as to combine the individual claims in order to make up the jurisdictional amount of $3,000.00. The existence of the common question of law or fact would not eliminate the requirement that the jurisdictional amount in controversy exceed $3,000.00. The fact that 334 independent contracts might involve in the aggregate in excess of $3,000.00 would not give to the Federal Courts jurisdiction to hear such independent causes of action, even though consolidation for the purpose of trial might be permitted.

CONCLUSION.

Respondent contends that the petition for certiorari is without merit, and, therefore, should be denied.

Respectfully submitted,

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